

**REDACTED DECISION – DK#’s 13-032 CU, 13-033 P**

**BY: GEORGE V. PIPER, ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON DECEMBER 29, 2014  
ISSUED ON JULY 14, 2015**

**SYNOPSIS**

**TAXATION**

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT  
SUPERVISION**

**GENERAL DUTIES AND POWERS OF COMMISSIONER**

It shall be the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies, whether of the State or of any county, district or municipal corporation thereof, are faithfully enforced. W. Va. Code § 11-1-2.

**TAXATION**

**WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT  
COLLECTION OF TAX**

“The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code § 11-10-11(a).

**TAXATION**

**CONSUMERS SALES AND SERVICE TAX  
AMOUNT OF TAX; ALLOCATION OF TAX AND TRANSFERS**

Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same from the purchaser and to pay the amount of tax to the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter. *See* W. Va. Code § 11-15-1 and § 11-15-3.

**TAXATION**

**CONSUMERS SALES AND SERVICE TAX  
PURCHASER TO PAY; ACCOUNTING BY VENDOR**

“The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the state for all tax paid by the purchaser.” W. Va. Code § 11-15-4.

**TAXATION**

**CONSUMERS SALES AND SERVICE TAX  
PURCHASER TO PAY; ACCOUNTING BY VENDOR**

“(b) The vendor shall keep records necessary to account for: (1) The vendor’s gross proceeds from sales of personal property and services; (2) The vendor’s gross proceeds from

taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . .” W. Va. Code § 11-15-4(b)(1-4).

## **TAXATION**

### **CONSUMERS SALES AND SERVICE TAX**

#### **VENDOR MUST SHOW SALE OR SERVICE EXEMPT; PRESUMPTION**

“To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established.” W. Va. Code §11-15-6(b).

## **TAXATION**

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

#### **HEARING PROCEDURES**

“Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993).

## **TAXATION**

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

#### **HEARING PROCEDURES**

A sample and projection auditing method is appropriate if the taxpayer's records are inadequate or insufficient, so that a competent audit for the period in question is not otherwise possible. W. Va. Code R. § 110-15-14b.3.2 (1993).

## **TAXATION**

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

#### **HEARING PROCEDURES**

Based upon the fact that the Petitioner did not have adequate source records to perform a detailed audit, the tax auditor was correct in performing a sample and projection audit as set forth in West Virginia Code R. Section 110-15-14b.3.2.

## **TAXATION**

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

#### **HEARING PROCEDURES**

After performing a sample and projection audit under West Virginia Code R. Section 110-15-14b.3.2, the tax auditor is then permitted to apply the results to the entire audit period. Once a sample and projection audit has been performed, a taxpayer cannot meet its burden of proof in protesting its application for the tax years where he retained no source documents.

## **WEST VIRGINIA OFFICE OF TAX APPEALS**

### **CONCLUSION OF LAW**

The Tax Commissioner was justified in using the specific identification method to identify

purchases, using Petitioner's federal tax filings to calculate sales and utilizing the calculated sales to purchase cost ratio to determine the assessment where the Petitioner listed the purchase price for the stated inventory after each sale was made.

## **TAXATION**

### **WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT ASSESSMENT**

"If the Tax Commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor." W. Va. Code § 11-10-7(a).

## **TAXATION**

### **WEST VIRGINIA OFFICE OF TAX APPEALS HEARING PROCEDURES**

In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

## **TAXATION**

### **WEST VIRGINIA OFFICE OF TAX APPEALS CONCLUSION OF LAW**

The Tax Commissioner's assessments against the Petitioner for underreported combined sales and use tax as well as personal income tax were not erroneous, unlawful, void, or otherwise invalid.

## **TAXATION**

### **WEST VIRGINIA OFFICE OF TAX APPEALS CONCLUSION OF LAW**

The Petitioner in this matter has not met its burden of showing that the combined sales and use tax and personal income tax assessments issued against him were erroneous or otherwise invalid.

## **FINAL DECISION**

On November 20, 2012, the Auditing Division of the West Virginia State Tax Commissioner's Office (the Tax Department or the Respondent) issued two audit notices of assessment, against the Petitioner. These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq.* of the

West Virginia Code. The first assessment was for combined sales and use tax for the period of July 1, 2008, through March 31, 2012, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_ and additions to tax in the amount of \$\_\_\_\_\_ for a total assessed tax liability of \$\_\_\_\_\_. The second assessment was for personal income tax for the period January 1, 2009, through December 31, 2011, for tax in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, and additions to tax in the amount of \$\_\_\_\_\_ for a total assessed tax liability of \$\_\_\_\_\_. Written notice of these assessments was served on the Petitioner as required by law.

Thereafter, on January 17, 2013, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, two petitions for reassessment. *See* W. Va. Code §§ 11-10A-8(1); 11-10A-9.

Subsequently, a notice of a hearing on the petitions was sent to the Petitioner, and the subsequent hearings were held in accordance with the provisions of West Virginia Code Section 11-10A-10.

### **FINDINGS OF FACT**

1. Petitioner, a sole proprietorship, is engaged in the business of buying animals from breeders and reselling those animals to the general public. His business is located in a West Virginia county.

2. In the fall of 2012, an auditor from the West Virginia State Tax Department traveled to the offices of the Petitioner's former accountant for the purpose of conducting an audit of the Petitioner's business.

3. During the audit, the tax auditor was provided with gross deposit figures from the general ledger, as well as inventory sheets which tracked weekly animal purchases. The auditor

reviewed the Petitioner's federal tax returns, which were filed during the audit period. The tax auditor also requested to see bank statements for that period; however, none were provided.

4. Petitioner filed combined sales and use tax returns for each of the tax periods reflected in the audit. However, some returns were filed with no remittances. Petitioner was given credit for all sales tax that was paid during the audit period.

5. The tax amount of unpaid combined sales and use tax owed from all the filed returns totaled \$\_\_\_\_\_. This amount was included in the combined sales and use tax assessment and is not being contested by the Petitioner.

6. Petitioner did not have source documents for audit periods prior to January 1, 2012. However, the Petitioner did have source documents from January 1, 2012 through March 31, 2012. As such, the tax auditor used those documents to perform a sample and projection audit for those three months and then applied those findings to the entire audit period.

7. Petitioner maintained his books and records on a cash basis method of accounting for the entire audit period.

8. The Tax Commissioner's auditor used the specific identification method<sup>1</sup> to determine a ratio to project gross sales from the reported gross sales of animals reported in the cost of goods sold.

9. The tax auditor reviewed the Petitioner's deposit records to determine the total sales made in the first quarter of 2012, which amounted to \$\_\_\_\_\_. The tax auditor then determined a markup ratio of 3.46 for all animals sold in the first quarter of 2012. That ratio, when applied to

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<sup>1</sup> Specific identification is an inventory valuation method in which the actual cost of the purchased and issued (used or sold) items is identified by a purchase date or a serial number.

the cost of goods reported by the Petitioner of \$\_\_\_\_\_, was used to calculate the gross sales amount for the purpose of the audit.

10. The cost of goods sold figures, which the Petitioner reflected for tax years 2009, 2010 and 2011, were roughly the same as reported on his federal income tax returns for those same years.

11. The personal income tax assessment was derived by using the same sales figures which make up the combined sales and use tax assessment. In other words, should the sales tax assessment found to be due and owing, that same figure would determine the amount of the personal income tax assessment. Likewise, if the sales were correctly reported by the Petitioner, the parties agree that the assessment for personal income tax would be a nullity.

### **DISCUSSION**

The West Virginia Code provides that “[f]or the privilege of selling tangible personal property . . . and for the privilege of furnishing certain selected services . . . the vendor shall collect from the purchaser the tax as provided under this article . . . and shall pay the amount of tax to the Commissioner in accordance with the provisions of this article . . .” W. Va. Code § 11-15-3(a). “‘Vendor’ means any person engaged in this state in furnishing services taxed by this article or making sales of tangible personal property . . . .” W. Va. Code § 11-15-2(26).

Likewise, the Code provides that “[t]he purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code § 11-15-4(a). Section 4 also sets forth the record keeping requirements for vendors tasked with collecting sales tax, to wit:

(b) The vendor shall keep records necessary to account for: (1) The vendor's gross proceeds for sales of personal property and services; (2) The vendor's gross proceeds from taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . .

W. Va. Code § 11-15-4(b).

Section 14a of Title 110, Series 15 of the West Virginia Code of State Rules also lays out the record keeping requirements applicable to Petitioner and states that: “[e]very person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumers sales and use tax purposes.” W. Va. Code R. § 110-15-14a.1 (1993). Each record kept by persons doing business in West Virginia “shall consist of the normal books of account ordinarily maintained by the average prudent person engaged in the activity in question . . . .” *Id* at 14a2. A sample and projection auditing method is appropriate if: the taxpayer's records are inadequate or insufficient, so that a competent audit for the period in question is not otherwise possible . . . *Id* at 14b.3.2. Finally,

If the tax Commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the liability and make an assessment therefor. W. Va. Code § 11-1-7(a).

In an apparent challenge to Petitioner's sample and projection audit, the Petitioner acknowledges, as he must, that only a single quarter was audited because the Petitioner had no source documents to support its general ledger. Nevertheless, the Petitioner claims that the audit was flawed because the Respondent used the accrual based specific identification method for valuing inventory rather than using Petitioner's incomplete and unsupported cash based amounts,

despite the fact that Petitioner admits that the Respondent's calculation correctly identified the cost of goods sold markup for specific identification.

Although Petitioner agrees to the Respondent's use of the specific identification to identify inventory during the sample period, the Petitioner urges this Tribunal to accept that the tax auditor's results are somehow skewed by using specific identification to identify inventory outside the sample period. In support of his argument, the Petitioner first argues that his expert witness testified that using the specific identification cost of goods sold number in making calculations and determining audit markups with the cash purchase numbers would overstate the gross sales when calculating the monthly average sales. Petitioner then paradoxically argues that its reported sales must be accepted because the Respondent failed to utilize in its audit Generally Accepted Accounting Principles ("GAAP"), which are standards of financial reporting imposed by the Financial Accounting Standards Board and which require accrual based accounting.

Petitioner's argument is flawed for several reasons. First, the Internal Revenue Service ("IRS") has stated that "[g]enerally, if you produce, purchase, or sell merchandise, you must keep an inventory and use an accrual method for sales and purchases of merchandise." IRS Publication 538 (the "Publication"), at page 7-8, paragraph 6 (cash method). Page 11 of Pub. 538 at paragraph 14 (inventories), states that "[a]n inventory is necessary to clearly show income when the production, purchase, or sale of merchandise is an income-producing factor. If you must account for an inventory in your business, you must use an accrual method of accounting for your purchases and sales. "However, see *Exceptions*, next. See also *Accrual Method*, earlier."

The Publication also states that "[t]o figure taxable income, you must value your inventory at the beginning and end of each year. To determine the value, you need a method of identifying the items in your inventory and a method for valuing these items. See *Identifying Cost and Valuing*



*Inventory*, later.” Pub. 538 at Page 12, Paragraph 1. Moreover, “[t]he rules for valuing inventory are not the same for all businesses and must be consistent from year to year.” *Id.* at Page 12, Paragraph 2.

There are, however, exceptions to the general rule of valuing inventory as stated above. The Publication provides that “[t]he following taxpayers can use the cash method of accounting even if they produce, purchase, or sell merchandise . . . . [a] qualifying taxpayer under Revenue Procedure 2001-10 on Page 272 of Internal Revenue Bulletin 2001-2 [“IRB 2001-2”], available at [www.irs.gov/pub/irs-irbs/irb01-02.pdf](http://www.irs.gov/pub/irs-irbs/irb01-02.pdf) [and] [a] qualifying small business under Revenue Procedure 2002-28 [“IRB 2002-28”], on page 815 of Internal Revenue Bulletin 2002-18, available at [www.irs.gov/pub/irs-irbs/irb02-18.pdf](http://www.irs.gov/pub/irs-irbs/irb02-18.pdf).” Publication, at Page 12, Par. 4 (Exceptions).

The Code of Federal Regulations provides the general rule for inventories and states that “[q]ualifying taxpayers with average annual gross receipts of \$1,000,000 or less are exempted from the requirement to use an accrual method of accounting under § 446 of the Code and to account for inventories under § 471. . . .” IRB 2001-2 at Page 257 (Section 471-General Rule For Inventories) (*quoting* 26 C.F.R §1.471-1; *Need for Inventories*) (*citing* Rev. Proc. 2001-10, page 272). IRB 2001-2 (the “Bulletin”) directly quotes Rev. Proc. 2001-10, which provides, in pertinent part, that:

.01 Section 446(a) provides that taxable income must be computed under the method of accounting on the basis of which the taxpayer regularly computes income in keeping the taxpayer’s books.

.02 Section 446(c) generally allows a taxpayer to select the method of accounting it will use to compute its taxable income. A taxpayer is entitled to adopt any one of the permissible methods for each separate trade or business, including the cash method and an accrual method, subject to certain restrictions. For example, § 446(b) provides that the selected method must clearly reflect income. In addition, § 1.446-1(c)(2)(i) requires that a taxpayer use

an accrual method of accounting with regard to purchases and sales of merchandise whenever § 471 requires the taxpayer to account for inventories, unless otherwise authorized by the Commissioner under § 1.446-1(c)(2)(ii). Under § 1.446-1(c)(2)(i), the Commissioner has the authority to permit a taxpayer to use a method of accounting that clearly reflects income even though the method is not specifically authorized by the regulations.

.03 The cash method generally requires an item to be included in income when actually or constructively received and permits a deduction for an expense when paid under § 1.446-1(c)(1)(i).

.04 Section 471 provides that whenever, in the opinion of the Secretary, the use of inventories is necessary to clearly determine the income of the taxpayer, inventories must be taken by the taxpayer. Section 1.471-1 requires a taxpayer to account for inventories when the production, purchase, or sale of merchandise is an income-producing factor in the taxpayer's business.

Bulletin, at Page 272-273 (quoting Rev. Proc. 2001-2, Sections 2.01-2.04).

Similarly, Revenue Procedure 2002-18 provides, in pertinent part, that:

.05 The cash method generally requires an item of income to be included in income when actually or constructively received and permits a deduction for an expense when paid.... Section 1.446-1(c)(1)(i).

.06 Section 471 provides that whenever, in the opinion of the Secretary, the use of inventories is necessary to clearly determine the income of the taxpayer, inventories must be taken by the taxpayer. Section 1.471-1 generally requires a taxpayer to account for inventories when the production, purchase, or sale of merchandise is an income-producing factor in the taxpayer's business.

Bulletin, at Page 816 (quoting Rev. Proc. 2002-18, at Page 272-273 Sections 2.05-2.06).

As the Respondent aptly noted, there is no legal authority that imposes GAAP upon Respondent's auditors because such audits are conducted within the bounds of the West Virginia Code. Further, this Tribunal agrees with the Respondent that there is ample testimony and evidence in the record showing that sales were substantially underreported based upon what was

reflected in the limited available records as compared to reported sales and the very limited number of cash transactions that were reported.

Even if we accept Petitioner's argument that the cash basis method of accounting should have been used, the result here would be the same because the method of reporting, whether cash or accrual basis, unquestionably must clearly reflect income. The record is replete with evidence that the Petitioner's records do not clearly reflect income.

Rather, Petitioner here asks this Tribunal to provide his requested relief based substantially if not wholly upon his previously filed tax returns for tax years 2008, 2009, 2010 and 2011, and without providing any source documents other than a general ledger. Remarkably, Petitioner also agrees with the audit findings for the sample period for which he had records but then argues that the findings should only be applied to those three months rather than to the three year audit period. In effect, the Petitioner wants to have it both ways.

At the outset, Petitioner's reason for not keeping tax records is without merit. The Petitioner testified that some unidentified person in the Tax Department told him that he did not have to keep tax records for his business and therefore he decided to use those documents to line the floors of his animals' cages. His counsel at the hearing freely admitted, as he must, that his client had no source documents in order to even do a detailed audit.

To accept Petitioner's argument would impermissibly shift the burden of proof to the Respondent to prove that Petitioner's tax returns were not correct, rather than the reverse as required by law. Moreover, Petitioner's position allows the Petitioner to pick and choose which part of a sample and projection audit he agrees with thereby allowing him to dodge the question of his tax returns for which he has no source documents. Given these facts in evidence and based upon review of the entire record in this matter, there is no question that the tax auditor was

compelled to do a sample and projection audit using the only three months for which Petitioner had adequate records. Again, Petitioner does not dispute the findings from that three month audit except insofar as specific identification was supplied to tax periods prior to January 1, 2012.

Accordingly, we find that in the absence of source documents proving otherwise, the tax auditor was legally justified using specific identification as part of his sample and projection audit. Further, we find that the Tax Commissioner was justified in using the specific identification method to identify purchases, Petitioner's federal tax filings to calculate sales and the calculated sales to purchase cost ratio to determine the assessment where the Petitioner listed the purchase price for the stated inventory after each sale was made.

Petitioner next argues that the Respondent's calculation is in error because it failed to take into account the loss of inventory due to the death of animals. During the reconvened hearing on August 6, 2014, Petitioner presented testimony for the first time that a significant number of animals had died from a disease fatal to animals, were otherwise unavailable for sale, or were never sold during the audit period.<sup>2</sup> This would of course reduce the cost of goods sold ratio arrived at for the sample period, which would in turn reduce the sales figures reflected in the audit.

Petitioner goes on to argue that since his expert testified that upon review of Petitioner's purchase and sales there were no sales requiring adjustment, the returns filed by the Petitioner were correct and there was no basis for the assessment. Finally, he argues, for the first time, that the calculation failed to take into account the loss of inventory due to the disease related deaths of some animals.

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<sup>2</sup> Respondent's tax auditor testified that he had no memory of ever having been informed by the Petitioner that a significant number or any number of animals had died during the audit period.

To illustrate:

**JUDGE PIPER:** But you don't have any records on dead animals for 2009, '10 and '11 do you?

**PETITIONER'S CPA:** No, I do not.

**JUDGE PIPER:** Well, then how do you ...? I don't understand how you wouldn't have to use that as a variable in doing something for those years. I don't see how you can just say 2012 takes care of everything and we've reported everything correctly. The testimony is that the taxpayer had no records for 2009, really, '10 and some for '11.

**PETITIONER'S COUNSEL:** Your Honor, I believe the testimony is that the primary records were not there. We have our computer records, the general ledger records and all that show the sales. We have our general ledger records that show the purchases. We have our general records that show expenses. We have all of those --- we don't have the primary source document.

**JUDGE PIPER:** You don't have the source documents ---

**PETITIONER'S COUNSEL:** We don't have a complete set of source documents.

**JUDGE PIPER:** --- to add up to your general ledger; right?

**PETITIONER'S COUNSEL:** That's correct, your honor. Transcript, at \*102.

Petitioner's present CPA testified that its general ledger reflects the purchases of animals *after* they are sold which would clearly require using specific identification in order to match the purchase and sale of each identifiable animal. This testimony tends to undercut Petitioner's argument that the Tax Commissioner is really matching apples with oranges (what Petitioner claims is a "timing issue) in that not all animals purchased in the audit period were sold in the audit period.

This argument is misplaced. We reject any attempt by the Petitioner to further revise the assessments because he now claims it contained animals that died or were not otherwise sold, as

these facts and issues were never brought to the attention of this Tribunal at either the pre-hearing conference or during the initial evidentiary hearing and as the Petitioner has no corroborating source documents to prove the veracity of his claim and in what amount.

Given all the facts in evidence and applying the applicable law to the issues presented here, this Tribunal hereby AFFIRMS the assessments for the reasons stated herein.

### **CONCLUSIONS OF LAW**

1. It shall be the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies, whether of the State or of any county, district or municipal corporation thereof, are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2.

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code § 11-10-11(a).

3. Article Fifteen of the West Virginia Tax Code imposes a general consumers sales and service tax, for the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services, and it is the duty of the vendor to collect the same from the purchaser and to pay the amount of tax to the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter. *See* W. Va. Code § 11-15-1 and § 11-15-3.

4. “The purchaser shall pay to the vendor the amount of tax levied by this article which is added to and constitutes a part of the sales price, and is collectible by the vendor who shall account to the State for all tax paid by the purchaser.” W. Va. Code § 11-15-4.

5. “(b) The vendor shall keep records necessary to account for: (1) The vendor’s gross proceeds from sales of personal property and services; (2) The vendor’s gross proceeds from

taxable sales; (3) The vendor's gross proceeds from exempt sales; (4) The amount of taxes collected under this article, which taxes shall be held in trust for the state of West Virginia until paid over to the tax commissioner . . . ." W. Va. Code § 11-15-4 (b)(1-4).

6. "To prevent evasion, it is presumed that all sales and services are subject to the tax until the contrary is clearly established." W. Va. Code §11-15-6(b).

7. "Every person doing business in the State of West Virginia . . . shall keep complete and accurate records as are necessary for the Tax Commissioner to determine the liability of each vendor or vendee for consumer sales and use tax purposes." W. Va. Code R. § 110-15-14a.1 (1993).

8. A sample and projection auditing method is appropriate if the taxpayer's records are inadequate or insufficient, so that a competent audit for the period in question is not otherwise possible. W. Va. Code R. § 110-15-14b.3.2 (1993).

9. Based upon the fact that the Petitioner did not have adequate source records to perform a detailed audit, the tax auditor was correct in performing a sample and projection audit as set forth in West Virginia. Code R. Section 110-15-14b.3.2.

10. After performing a sample and projection audit under West Virginia Code R. Section 110-15-14b.3.2, the tax auditor is then permitted to apply the results to the entire audit period. Once a sample and projection audit has been performed, a taxpayer cannot meet its burden of proof in protesting its application for the tax years where he retained no source documents.

11. The Tax Commissioner was justified in using the specific identification method to identify purchases, using Petitioner's federal tax filings to calculate sales and utilizing the calculated sales to purchase cost ratio to determine the assessment where the Petitioner listed the purchase price for the stated inventory after each sale was made.

12. “If the Tax Commissioner believes that any tax administered under this article has been insufficiently returned by a taxpayer, either because the taxpayer has failed to properly remit the tax, or has failed to make a return, or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability and make an assessment therefor.” W. Va. Code. § 11-10-7(a).

13. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10A(e) W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

14. The Tax Commissioner’s assessments against the Petitioner for underreported combined sales and use tax as well as personal income tax were not erroneous, unlawful, void or otherwise invalid.

15. The Petitioner in this matter has not met its burden of showing that the combined sales and use tax and personal income tax assessments issued against him were erroneous or otherwise invalid.

### **DISPOSITION**

WHEREFORE, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the combined sales and use tax assessment issued against the Petitioner, for tax in the amount of \$\_\_\_\_\_, interest of \$\_\_\_\_\_ and additions to tax of \$\_\_\_\_\_ for a total assessed amount of \$\_\_\_\_\_, for the period of July 1, 2008 through March 31, 2012, should be and is hereby **AFFIRMED**.

Further, it is hereby determined that the personal income tax assessment issued against the Petitioner, for tax in the amount of \$\_\_\_\_\_, interest of \$\_\_\_\_\_ and additions to tax of \$\_\_\_\_\_ for



a total assessed amount of \$\_\_\_\_\_, for the period of January 1, 2009 through December 31, 2011, should be and is hereby **AFFIRMED**.

Interest continues to accrue on the unpaid taxes until these liabilities are fully paid pursuant to West Virginia Code Section 11-10-17(a).

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
George V. Piper  
Administrative Law Judge

\_\_\_\_\_  
Date Entered